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Case Nos. 04-805 and 04-814

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF VISA U.S.A. INC., THE COCA-COLA COMPANY AND MICROSOFT CORPORATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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MOTION OF *AMICI* FOR LEAVE TO FILE BRIEF

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, Visa U.S.A. Inc. ("Visa"), The Coca-Cola Company ("Coca-Cola") and Microsoft Corporation ("Microsoft") respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of petitioners. Petitioners have consented to the filing of this brief; respondents have refused their consent.

The judgment of the court of appeals is plainly wrong and should be reversed. But it also sends the signal that lower courts face uncertainty regarding the proper analysis of joint ventures. *Amici* submit that this case provides an opportunity for the Court to clarify the circumstances under which firms involved in joint ventures are at risk of antitrust liability by providing a clear articulation of the antitrust rules governing such ventures. Of those rules, the one in greatest need of clarification is when a joint venture should be treated as a single entity consistent with *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

As further explained in the accompanying brief, *amicus* Visa is one of the largest and most successful joint ventures in the world, and has been involved in some of the most important joint venture cases over the past two decades. *Amici* Coca-Cola and Microsoft participate in numerous joint ventures around the world. For *amici*—indeed, for the numerous businesses that have become increasingly dependent on cooperation as a means of facilitating competition—the development of clear antitrust rules applicable to joint ventures is crucial. *Amici* can provide this Court with important input into the formulation

of these rules, and their impact on American business, that goes beyond what can be addressed by the parties.

Accordingly, *amici* respectfully request leave to file the accompanying brief.

Respectfully Submitted,

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BRIEF OF *AMICI* SUPPORTING PETITIONERS

INTEREST OF *AMICI*

Amicus Visa U.S.A. Inc. ("Visa") is one of the world's largest and most successful joint ventures, created to bring to American consumers the benefits of a general purpose payment card network. As a joint venture that has created a payment system that is "truly greater than the sum of its parts[,]" *Nat'l Bancard Corp. v. Visa U.S.A. Inc.*, 779 F.2d 592, 602 (11th Cir. 1986) (internal quotation omitted), Visa has a significant interest in this case. Although Visa differs in many respects from the joint venture at issue here, its continuing viability, and the enormous competitive benefits that it has created, are dependent upon the articulation and application of coherent, predictable and efficient antitrust principles for joint ventures. The lack of such principles can result in costly, burdensome and potentially destabilizing antitrust litigation. Visa has been at the center of some of the most significant antitrust cases relating to joint ventures over the past two decades. *See Nat'l Bancard Corp.*, 779 F.2d 592; *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994); and *United States v. Visa U.S.A. Inc.*, 163 F.Supp. 2d 322 (S.D.N.Y. 2001), *modified in part on other grounds*, 183 F.Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 45 (October 4, 2004).[1]

[1] This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel. Petitioners have consented to the filing of this brief; respondents have refused their consent. Accordingly, the requisite motion for leave under Rule 37.3 of the Rules of United States Supreme Court is filed with this brief.

Amici the Coca-Cola Company and Microsoft Corporation are among America's best known and most successful companies, with operations spanning the globe. Each is involved in numerous joint ventures here and abroad, and each seeks to enter into others with confidence and clear knowledge of the applicable legal principles under U.S. antitrust law.

SUMMARY OF ARGUMENT

1. Joint ventures play an increasingly important role in the domestic and world economy, but those that offer the potential for the greatest economic benefits continue to be treated as second-class corporate citizens under U.S. antitrust law. As this case makes unmistakably clear, many courts remain highly skeptical of any agreements limiting competition among horizontal competitors, even where such agreements are integral to the formation or operation of a legitimate joint venture. That attitude inappropriately discourages the formation of such ventures. This case, therefore, provides an appropriate, and much needed, opportunity for this Court not simply to reverse the holding below (which is quite plainly mistaken) but to articulate a clear approach to the analysis of joint ventures under U.S. antitrust law—including the proper standards for addressing the legality of a venture upon formation and thereafter; when a venture should be regarded as a single entity; and when the ancillary restraint doctrine applies.

2. This Court noted in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), that joint ventures lie somewhere between single-firm activity and horizontal combinations. That brief *dicta*, however, did no more than pose a fundamental issue of characterization—when Sec-

tion 1 applies to a joint venture—that is every bit as important in commercial terms as the parent-subsidiary question decided in *Copperweld*. That issue needs to be decided here.

Section 1, 15 U.S.C. 1, unquestionably applies to the formation of a joint venture among competitors and to their agreement to eliminate certain types of competition between them. But once formed, the joint venture participants no longer are in competition with respect to matters within the scope of the venture *i.e., the permitted scope of the integration*. Therefore, within the scope of the venture's operations, they are legally incapable of forming a horizontal agreement subject to Section 1. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984) (a horizontal agreement is "an agreement among competitors on the way in which they will compete *with one another*") (emphasis added). A joint venture in which the participants agree to eliminate all competition between themselves and between themselves and the venture, thus, should be treated as a single entity when it does those things it was established to do because, as *Copperweld* teaches, its participants are no longer "independent centers of decision making that competition assumes and demands." 467 U.S. at 769.

To hold otherwise, and subject every decision of a joint venture firm to potential antitrust scrutiny—even under the rule of reason—undermines the utility of joint ventures as a form of industrial organization. Consistent with the rationale of *Copperweld*, after formation a venture should not be treated as a day-by-day conspiracy of its creators, but instead, should be regarded as a single entity carrying out its approved operations without risk of Section 1 liability. Application of the single entity doctrine to alleviate

the perpetual risk of rule of reason litigation, thus, is a necessary precondition to the placement of joint ventures on equal footing with other forms of industrial organization.

3. In this case, the Federal Trade Commission ("FTC") and several state Attorneys General resolved the issue of Equilon's legality and the permissible scope of its owners' integration when they approved the establishment of the venture in the first place. As they recognized, the formation of Equilon (and a companion venture, Motiva) eliminated all competition between Shell and Texaco with respect to the refining and sale of gasoline in the United States. Pet. App. 4a.[2] Put simply, Shell and Texaco ceased to participate separately in U.S. downstream markets. *Id.* Accordingly, the regulators analyzed the formation of Equilon as if it were a complete merger of the companies' downstream operations.

Petitioners' decision to create Equilon purportedly is not challenged by the respondents. But once the matter of Equilon's existence and the scope of its operations was resolved, there was no Section 1 question left to be considered where the only matter in issue was the right of the venture to set the prices for the things it has been allowed to make and sell. It is no more appropriate to ask whether Equilon should be allowed to decide what to charge for Texaco and Shell gasoline than to ask whether Sears can put a price tag on its dishwashers, or a law firm can decide what to charge for its attorneys' services. By characterizing the venture's setting of a price for the sale of its own gasoline as *per se* illegal, the court of appeals, in reality, posed (and answered) an entirely different question:

[2] References are to the appendix filed with Shell's petition (04-814).

whether the joint venture should be permitted to engage in the production and marketing of gasoline in the first place. Such a question may be raised, but not by means of a *per se* price-fixing claim alleging a horizontal conspiracy by the venture's members. To the contrary, the decision to allow the Texaco-Shell venture (a) to be created and (b) to include the production and marketing of Shell and Texaco gasoline within its scope necessarily carried with it—free from Section 1 attack—the right to price the products it was allowed to produce and market.

The court of appeals committed fundamental error by permitting what is tantamount to an after-the-fact attack on formation under the guise of a *per se* price-fixing claim. Imposing a risk of liability for doing no more than what has been approved by the regulators is not simply legally misguided, but is inimical to sensible competition policy.

4. Correct application of the single entity doctrine in this case will not create an unduly broad antitrust safe harbor for joint ventures. Issues of legitimacy and scope remain entirely fair (indeed, necessary) subjects of review by regulators and courts under both Section 1 and Clayton Act Section 7, 15 U.S.C. 18.

Section 1 also applies, post-formation, to restraints on conduct outside the scope of the integration where the participants remain actual or potential competitors, or where a restraint impacts competition between the venture and its participants *qua* owners. Thus, a restraint on non-venture output is subject to analysis under the ancillary restraints doctrine. Similarly, an agreement by Shell and Texaco not to compete with Equilon in the downstream market in the United States is a restraint ancillary to the formation of Equilon. *See, e.g., United States v. Addyston Pipe & Steel*

Co., 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). In addition, as *Copperweld* observed, Section 2, 15 U.S.C. 2, of the Sherman Act applies to single firm conduct, and hence, is fully applicable to predatory behavior by joint ventures at any time. 467 U.S. at 777.

Nonetheless, a clear distinction needs to be drawn between a venture's own operations and activities falling outside the venture as to which the venture's owners remain competitors. The formation of Equilon eliminated all competition in the downstream gasoline business between Shell and Texaco. A decision by Equilon as to how to price the gas it sells is not ancillary to anything. It is the very activity for which the venture was created and, as such, presents no Section 1 issue under the ancillary restraint doctrine or otherwise.

ARGUMENT

I. IT IS IMPORTANT TO ESTABLISH A CLEAR FRAMEWORK FOR ANALYZING JOINT VENTURES UNDER U.S. ANTITRUST LAW.

Joint ventures are ubiquitous and operate in virtually every sector of the economy. It has been estimated that the number of joint ventures and strategic alliances are growing annually by 25 to 35 percent, with a current rate of formation of approximately 10,000 per year. *See* Peter Pekar, Jr. and Mark S. Margulis, *Equity Alliances Take Center Stage*, 14:2 Bus. Strategy Rev. 50, 55 (2003). They are a vital part of our economic system, *see* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach To Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1139, (2001) ("collaborations are becoming the dominant form of eco-

nomic integration in the world economy"), and it is, therefore, critically important to protect their utility as a form of industrial organization.

This Court has recognized the significant procompetitive benefits that joint ventures—particularly those among competitors—can generate. *See, e.g., NCAA*, 468 U.S. at 103 ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."); *see also Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (*"BMI"*); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). So, too, have commentators. *See, e.g.*, XI Herbert Hovenkamp, *Antitrust Law* ¶ 1907c, 221 (1998) (joint ventures can generate "cost reductions [that] tend to yield higher output and lower prices . . ."); *see also* Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 876 (1994) ("A joint venture may allow its partners to achieve economic efficiencies that they could not have accomplished on their own. In the long run, such efficiencies may outweigh any restriction of competition caused by a joint venture."); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 702 (1998) ("Joint ventures are an important and distinct category for antitrust analysis because of their potential to bring about an efficiency-enhancing integration of economic activity."). Regulators have also acknowledged that competitor collaborations can generate efficiency gains that "stem from combinations of different capabilities or resources," or that "facilitate the attainment of scale or scope economies beyond the reach of any single participant." Department of Justice ("DOJ") & FTC, *Antitrust Guide-*

lines for Collaborations Among Competitors (Apr. 2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) ("*Guidelines*"), § 2.1.

Precisely because of their ubiquity and potential for producing significant consumer welfare benefits, it is critical for courts to develop and apply appropriate rules for dealing with joint ventures. As then-FTC Chairman Timothy Muris observed: "No analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." *In the Matter of Polygram Holding, Inc.*, No. 9298, 2003 FTC LEXIS 120, at *12, *aff'd* 416 F.3d 29 (D.C. Cir. 2005) ("*Three Tenors*").

American antitrust law, uniquely, is a creature of judicial, as opposed to legislative, decision-making. Not only is the language of the Sherman and Clayton Acts exceedingly general in critical respects, those statutes—as this Court has observed, on several occasions—cannot mean what they say.[3] Yet, incorrect antitrust analysis, and the resulting uncertainty which it fosters, pose serious risks to effective competition. Particularly in the area of joint ventures, where the law has struggled to encourage efficient business organizations amidst its inherent distrust of horizontal arrangements among competitors, there is a compelling need for certain, predictable and efficient rules. *See*

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[3] *See Nat'l Soc. of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says."); *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-32 (1983); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

generally Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 4-9, 12-13 (1984) (discussing risks of permitting business practices to be second-guessed under the antitrust law by courts and juries who are not well-equipped to balance the "pros" and "cons" of allegedly exclusionary practices).

Amici submit that there is little doubt that the court of appeals' decision in this case was mistaken both in result and in approach. In fact, the decision to apply the *per se* rule in this case was so plainly misdirected that it is tempting simply to reverse on the ground that the practice in question here cannot possibly come within the narrow category of practices deemed conclusively unlawful without even a consideration of other market facts. *See, e.g., NCAA*, 468 U.S. at 100 (*per se* rule may be applied only to an agreement that "facially appears to be one that would almost always tend to restrict competition and decrease output"); *see also State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (*per se* rule to be applied only where there are "predictable and pernicious anti-competitive effects" as well as "limited potential for pro-competitive benefits") (citation omitted). Small wonder, then, that the United States not only urged this Court to review that decision, but suggested that the Court consider summary reversal. *See* Brief of the United States as *Amicus Curiae* (in support of petitions for writ of certiorari) ("Br. of U.S.") at 19. Yet, however inviting that suggestion may have been, to do so would be to miss an important—and much needed—opportunity both to clarify the application of the antitrust laws to joint ventures and, even more important, to address the actual issue presented by this case, which is why does Section 1 apply here at all? *Amici* respectfully submit that the central

issue presented by this case is not the application of the rule of reason (as opposed to the *per se* rule) but whether a joint venture's decision to price its goods presents anything more than the act of a single entity, to be adjudicated as such. Put in doctrinal terms, is the pertinent authority *BMI*, 441 U.S. 1, or *Copperweld*, 467 U.S. 752? *Amici* suggest that it is the latter.[4]

Amici, thus, urge this Court not only to reverse, but to use this case as an opportunity to clarify the circumstances under which firms involved in joint ventures are at risk of antitrust liability. To assist the Court, *amici* suggest a framework for analyzing joint venture conduct that will encourage the formation of pro-competitive ventures while permitting adequate assessment of their potential adverse effects on competition.

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[4] In *BMI*, 441 U.S. 1, this Court held that an agreement among joint venturers nominally "fixing" the price of their respective outputs might, because of the obvious efficiencies associated with collective licensing of copyrighted music, not be subject to *per se* condemnation. 441 U.S. at 20-21. That decision was both unquestionably right and an important step forward in terms of analyzing joint venture conduct. However, it is equally important to resist the temptation to treat it as the outer limits of what a joint venture can claim as protection under the antitrust laws. In that case, the output in issue was that of the members, not of the venture, and it remained such following formation of the venture. The fact that there was an obvious efficiency justification in the reduction of transaction costs from a blanket license did not remotely suggest that there was no antitrust issue at all (*i.e.*, that the *BMI* venture should have been treated as a single entity). That was a classic rule of reason case. However, it is quite different from the situation where a joint venture is allowed to integrate production and marketing functions into the venture itself, thereby in effect merging the pre-existing operations of the venturers in the new entity and eliminating all competitive activity by the participating venture partners in that aspect of the business. See, *infra*, Section II.

In particular, *amici* submit that ventures should be most closely scrutinized when they are formed, at the time when the owners' expectations are established and when the degree of permissible limitations on competition between venture participants is delineated. An efficiency-enhancing integration of operations by joint venture participants should be examined under the rule of reason, and harms and benefits should be balanced, as specifically done here by the regulators under the rigorous merger standards of Section 7 of the Clayton Act. However, once the legality of the venture, and its proper scope of operations, has been established, a joint venture in which the participants no longer compete at all in the market should be treated as a single entity when it does no more than the things that it was established (and, in some cases, explicitly approved) to do. Restrictions on the activities of members outside of the venture (such as "loyalty" rules)[5] or restrictions on competition between the venture and its owners,[6] of course, remain subject to rule of reason scrutiny under Section 1. *See*, Section IV, *infra*.

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[5] *See, e.g., United States v. Visa U.S.A. Inc.* 344 F.3d 299 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004).

[6] *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 223-30) (D.C. Cir. 1986) (Bork, J.) (applying ancillary restraints doctrine to prohibition against moving company's agents using joint venture property for non-venture business); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-190 (7th Cir. 1985) (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores).

II. THE SINGLE ENTITY DOCTRINE PLACES A VENTURE'S OWN ACTIVITIES OUTSIDE THE AMBIT OF SECTION 1.

In *Copperweld*, this Court addressed the circumstances in which nominally separate business entities should be treated as a single firm for antitrust purposes. While that decision can be viewed in purely formalistic terms, the underlying rationale of the Court's analysis actually reflects a more important, and normative, rationale: When firms do not possess competing economic incentives, there is no reason to subject their conduct to potential liability under Section 1 of the Sherman Act.

In the course of its *Copperweld* opinion, the Court noted, almost in passing, that joint ventures present a special case with respect to agreements allegedly restraining trade. 467 U.S. at 768. At one end of the spectrum are ordinary (unitary) firms. As a matter of law, they are not engaged in a combination or conspiracy when they conduct their business. Thus, for example, an agreement between a company's Vice-President of Purchasing and its Chief Financial Officer not to buy from a particular firm is not subject to antitrust inquiry because it is considered the act of a single firm, not a group boycott agreement between the two officers. *See Copperweld*, 467 U.S. at 769. The same is true of an agreement between a firm and its wholly-owned subsidiary. *Id.* Having the same owners, those owners are deemed to share the same economic goals and, as such, are incapable of reducing competition by their conduct or agreements.

At the other end of the spectrum, two firms that have no business relationship other than as competitors may not agree to forego competition between themselves whether

as to prices, output, products, customers or sales territories. Such "naked" horizontal agreements can have no effect *other* than to eliminate competition. Therefore, such agreements not only are illegal, they generally are illegal *per se*. *See Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356-57 (1982).

In the middle are joint ventures and, in particular, joint ventures between firms that otherwise compete with one another. The antitrust laws recognize that joint ventures are an important means of achieving pro-competitive efficiencies, and, where that is true, the antitrust laws not only allow a joint venture to be formed to carry out that cooperative activity, but they allow the venture to agree to eliminate competition that otherwise would exist between its owners in order to make their cooperation efficient.

There is no question that there are many instances in which the activities of joint ventures are subject to continuing evaluation under the rule of reason. However, there also are situations in which they should be regarded as single entities.[7] Thus, the critical question is where and how

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[7] For example, this Court observed in *Arizona*, 457 U.S. at 356, that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . [can be] regarded as a single firm competing with other sellers in the market." Other courts and commentators have expressed similar views. *See Chicago Prof. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (observing that the NBA may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few market opportunities"); *City of Mt. Pleasant, Iowa v. Assoc. Elec. Coop.*, 838 F.2d 268, 276 (8th Cir. 1988) (holding that Section 1 does not apply to the pricing decisions of an electric cooperative because "the cooperative organization is a single enterprise

to draw a meaningful dividing line between those two approaches.[8] Stated succinctly: When should a decision by a venture be treated as that of a single firm, and when should it be treated as an agreement among the venture's owners?

Copperweld suggests the answer. Where a venture is formed by owners who do not otherwise, or will no longer,

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pursing a common goal."); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005) (finding different clubs to be single entity because "[b]oth the national club and its affiliates have a common goal—the best interests of the Jack Russell Terrier."); *see also* VII P. Areeda, *Antitrust Law* ¶ 1478c, 355 (1986) ("In general, once a venture is judged to have been lawful at its inception and currently, its decisions should be regarded as those of a single entity rather than the parents' daily conspiracy on every purchase-sale-hiring-licensing choice.") (Professor Hovenkamp employs a slightly different articulation of this principle in his reissue of the classic Areeda treatise. *See* VII Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, 325 (2d ed. 2003)). *But see Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147-50 (9th Cir. 2003) (joint venture of associations of realtors not treated as single entity because the associations were actual and potential competitors); *Fraser v. Major League Soccer*, 284 F.3d 47, 57 (1st Cir. 2002) (finding soccer league was a group of separate teams capable of conspiring for purposes of the claims at issue); *North American Soccer League v. NFL*, 670 F.2d 1249, 1256 (2d Cir. 1982) (reversing the district court's finding that NFL acted as a single economic entity).

[8] Rule of reason scrutiny is not free of costs and risks in a competition policy regime that imposes treble damages for virtually all violations and where, as this Court has noted, there are risks of "false positives." *Cf. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("false condemnations 'are especially costly, because they chill'" procompetitive conduct) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). Antitrust policy should not deter parties from collaborating or persuade them to merge instead of forming a joint venture simply to avoid the risk of liability.

compete in the market, there ceases to be different competitive interests as to matters within the scope of the venture.[9] Thus, the fact that venturers previously were competitors as to certain activities that thereafter are permitted to be brought within the scope of the venture is no more relevant to the application of Section 1 than the fact

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[9] There is a second situation—not presented factually by this case—in which single entity analysis would be appropriate. Where firms join together in a network in order to produce products or transactions that are inherently interdependent, such as sports leagues or general purpose credit or debit card transactions, the "network" functions carried out by the venture also should be treated as the activity of a single entity since they, by definition, do not eliminate competition between the venturers that would exist *but for the creation of the venture*. *See NCAA*, 468 U.S. at 99; *Copperweld*, 467 U.S. at 769. To the contrary, those functions exist and need to be performed only because there has been a venture created. Thus, treating the inherently interdependent activities of the venture as the act of a single entity comports fully with the rationale for single entity treatment explained in the text here, albeit in a different context.

This is not to say that the activities of such ventures are immune generally from Section 1 scrutiny. To the contrary, as Judge Easterbrook carefully explained in *Chicago Prof. Sports Ltd. P'ship*, 95 F.3d 593, ventures such as sports leagues or card networks should be treated as single entities when they engage in certain activities that necessarily involve the participation of multiple entities in cooperation, but not when they engage in activities that are merely ancillary to the venture. *See* 95 F.3d at 600. Similarly, as the United States correctly noted in its earlier brief in this case, a Visa rule restricting competition by members outside of the venture properly was subject to rule of reason analysis under the ancillary restraints doctrine. See Br. of U.S. at 14, citing *United States v. Visa U.S.A. Inc.*, 344 F.3d at 243. In that situation, there is no inherent intendependency of function between the venturers and, thus, no reason not to apply normal Section 1 principles. However, the situation is different where the function itself necessarily involves multiple participants in order for the particular activity to occur at all. There, we submit, single entity treatment is called for.

that a parent and its newly-acquired subsidiary may—before their merger—have been competitors generally. Put differently, the role played by "ownership" in the parent-subsidiary context is supplied by the "scope of the venture" in joint venture cases. As to those functions, it is as if there has been a merger between the venturers and the rationale of *Copperweld* applies as fully to such activities as it does to the post-merger conduct of a parent and its subsidiary.

Stated in terms of this case, the Equilon joint venture, in effect, was a complete merger of the companies' downstream operations.[10] Once Texaco and Shell created Equilon, there was no competition (within the scope of the venture) between them, and neither continued to participate at all in the market in which the venture operated. As the United States observed in its brief supporting the petitions for a writ of certiorari: "The creation of the alliance ended competition between Shell and Texaco . . . [and] Texaco and Shell signed non-competition agreements which prohibited them from competing with . . . Equilon." Pet. App. 4a. They were no longer "independent participants in the downstream markets." (Br. of U.S. at 12).

Can it be said, then, that Equilon's pricing of its gasoline had any effect on competition? Not under *Copperweld*, because Equilon's price setting did not "deprive[ ] the mar-

[10] The assets transferred to the joint ventures included "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees." Pet. App. 3a n.3. The venture did not include petitioners upstream business—oil and gas exploration—in the United States nor their upstream and downstream operations elsewhere in the world. Pet. App. 4a & n.1. In those areas, petitioners continued to compete.

ketplace of the independent centers of decision making that competition assumes and demands." *Copperweld*, 467 U.S. at 769; *see also* VII Philip Areeda, *Antitrust Law* ¶ 1462b, 194 (2003) ("Coordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint"). Again, as decisively put by the United States: "Competition between brands under the exclusive control of a unitary company is not competition with which Section 1 is concerned." Br. of U.S. at 11 (citing *Copperweld*, 467 U.S. at 771).

Under *Copperweld*, there is no legal or economic basis for applying Section 1 to the pricing decisions of a production and marketing joint venture where the venturers have exited the market.[11] A joint venture engaged in the production and marketing of products must be free to do internally those things that are necessary for it to operate and to compete. "[A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers." *Chicago Prof. Sports Ltd. P'ship*, 95 F.3d at 598. That includes pricing its products. To deny to a production and marketing joint venture the ability to price its own goods is to deny it the right to compete, indeed, to exist. A joint venture's pricing of the things it sells not only is not illegal *per se*, it has no impact on competition and, for that reason, it is not an appropriate subject of antitrust inquiry at all.

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[11] Prior to *Copperweld*, Chief Justice Rehnquist had dissented from denial of certiorari in a joint venture case involving the *National Football League* on the ground that the league should have been treated as a single entity *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, C.J., dissenting from denial of cert.) ("the league competes as a unit against other forms of entertainment").

Both the FTC and Judge Fernandez, in dissent, believed that Equilon, once formed, should be treated no differently than a single firm when carrying out the functions contemplated (and approved) at its creation. Without using the "single entity" language, the United States apparently accepts that approach as well. *See* Br. of U.S. at 11.

That view is plainly correct. For as Judge Fernandez aptly noted in his dissent, "nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business also prices its own products.... What could be more integral to the running of a business than setting a price for its goods and services?"[12] Pet. App. 34a; *see also* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1906d, 239 (2d ed. 2005). ("[M]any forms of joint marketing require an agreement about the price to be charged."); *see also, id.*, ¶ 1908e at 263-64 ("[A]greements about price are often essential to the administration of certain joint ventures, particularly in

[12] In response to the dissent's sound conclusion that there is nothing radical about an entity pricing its own goods for sale, the Ninth Circuit majority suggested that Texaco and Shell may in fact have "agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance," and that that was not a decision made by a "single economic entity." Pet. App. 19a n.11. But the conclusion does not follow from the facts. Any decision regarding the pricing of Equilon's gasoline, whether made by the venture or its participants, related solely to the venture's operation, and not the participants' separate operations, which were being terminated in the downstream market. As such, it was a decision of a "single economic entity." In any event, even where parties negotiate with one another the terms of a joint venture, that is not price fixing, and it certainly cannot be condemned as *per se* illegal without any consideration of the proposed venture's likely benefits. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

distribution."); *see also* XIII Herbert Hovenkamp, *Antitrust Law* ¶2132(c), 180 (2d ed. 2005) ("joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold"). Moreover, since Texaco and Shell no longer compete in that business in the United States, who other than Equilon *could* price those products for sale? Pet. App. 34a.

In taking up the contrary view, both the court of appeals and the respondents, in their brief opposing the petitions for a writ of certiorari, betrayed a fundamental misunderstanding of joint ventures when they attributed great significance to the fact that the owners of the venture, as opposed to "the venture" itself, priced the gasoline which Equilon sold. *See* Pet. App. at 27a-28a ("The question is whether two former (and potentially future) competitors may create a joint venture in which *they* unify the pricing, and thereby fix the prices, of two of *their* distinct product brands.") (italics added) (underlining in original); Opposition to Petitions for Writ of Certiorari at 10 ("Shell and Texaco agreed to price the Shell and Texaco brands of gasoline at the same price"); *id.* at 11 ("the overall management of Equilon and Motiva rested with Members Committees consisting of representatives of each of the participating oil companies").

When representatives of Shell and Texaco are directing the business of Equilon, the fact is that they are no longer in competition with each other (or with Equilon) in the same market. That they have non-venture business outside (and unaffected by) that market is irrelevant to their efforts to pursue and advance the interest of the venture within the scope of its operations—a realm in which they are not competitors. Here, the gasoline produced and sold *by the*

venture (albeit under two separate licensed trademarks) needed to be priced *by the venture*. The identity of the individuals making that "venture" decision is irrelevant to the question of whether particular activity is venture business within the scope of its operations or not.

In the end, there is no reason to distinguish Equilon—an integrated joint venture carrying out all aspects of the downstream gasoline business in competition with other sellers—from other competitors based simply on its genesis or its structure. *See Chicago Prof. Sports Ltd. P'ship*, 95 F.3d at 598; *Arizona*, 457 U.S. at 356. This Court eschewed a "form over substance" approach in *Copperweld*, stating that "[t]he economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition." 467 U.S. at 772. Stated otherwise, "antitrust policy should not bias the selection of a form of business organization by entrepreneurs and investors." H. Chang, D. Evans and R. Schmalensee, *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 262 (1998).[13] But to give meaning to these sentiments, it is essential that joint ventures not be casually subjected to antitrust scrutiny regardless of context and regardless of whether there is reason to do so in the sense of economic unity recognized in *Copperweld*. Unless joint ventures are recognized as single economic entities when doing the things they were created to do—competing in the

[13] *See also Copperweld*, 467 U.S. at 773: "Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."

same way as other corporations—their viability as a co-equal form of industrial organization will be severely, and needlessly, compromised.

III. COMPETITIVE EFFECTS SHOULD BE ASSESSED AT THE TIME A JOINT VENTURE IS ESTABLISHED.

The fact that the Equilon joint venture now exclusively markets Texaco and Shell brand gasoline in the western United States does not mean that the decision to allow it to do so was (or should be) immune from competitive analysis. In fact, that analysis needed to be undertaken at the time the venture was formed including any questions about the intended inclusion of marketing as part of the venturers' proposed partial "merger."

The creation by competitors of an efficiency-enhancing joint venture always is subject to a rule of reason analysis under Section 1. "[M]ergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, formation of such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect." *Copperweld,* 467 U.S. at 768; *see also* VII Philip E. Areeda, *Antitrust Law* ¶ 1478, 318 (2d ed. 2003). The formation of a joint venture has also been analyzed under Section 7 of the Clayton Act, subject to its requirements and burdens of proof, and taking into account the venture's purpose as well as its potential effects on competition. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158. Private plaintiffs and regulators should have the opportunity to bring a timely challenge to the partici-

pants' claims regarding the potential benefits of a joint venture, its proposed scope of operations and its likely impact on competition.[14]

In this case, to reduce costs and maximize efficiencies, Equilon was created by Shell and Texaco to carry out all aspects of their downstream gasoline business. Equilon (along with Motiva, which is no longer a part of this case, *see* Pet. App. 9a-11a) was formed from virtually all of the companies' downstream assets. Pet. App. 3a n.3. In contrast to more limited joint ventures set up, for example, only to conduct research, engage in marketing or produce goods, Equilon was formed to own and operate *all aspects of the business*, from the refineries to the stations to the gas pumps.

Every aspect of Equilon's proposed operations was open to review by the FTC and various state Attorneys General. Among other factors, the FTC considered the parents' market shares; the concentration in the market (HHI); barriers to new entry; the likelihood of price collusion on activities *outside* the venture's scope; and other similar factors bearing on the likely effect on competition that might result

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[14] The statute of limitations requires private plaintiffs to bring a claim for damages within four years of formation. Clayton Act Section 4b, 15 U.S.C. 15b. Later claims may be possible under certain circumstances. "Clayton Act claims are not limited to challenging the initial acquisition of stocks or assets . . . since 'holding as well as obtaining assets' is potentially violative of Section 7." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1050 (8th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000), quoting *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 240 (1975). The government remains free to challenge a joint venture under Section 7 of the Clayton Act "at any time when a threat of the prohibited effects is evident," even decades later. *United States v. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957).

from formation of the venture. The likelihood that the venture would achieve cost savings and other efficiencies that could benefit consumers also would have been considered. Based on its review, the FTC (joined by certain state Attorneys General) identified a number of areas of competitive concern. These included: refining of gasoline and kerosene jet fuel in Puget Sound; refining of gasoline and kerosene jet fuel in the Pacific Northwest; refining of CARB gasoline in California; transportation of refined light petroleum products to the inland Southeast; the wholesale and retail sales of CARB gasoline in San Diego County; and terminaling, wholesale and retail sales of gasoline and diesel fuel in Hawaii. Accordingly, the FTC sought and obtained divestitures to remedy overlaps between Shell and Texaco in these markets. *See In The Matter of Shell Oil Company, et al.*, 125 F.T.C. 769, Consent Order (April 21, 1998); *see also* Pet. App. 3a.

The FTC's investigation focused on the actual market effects of the venture, not on the way in which it was going to price its gasoline. Although the decision to include marketing within the venture surely was open to review and challenge at that time (along with any other element of the proposed integration) nothing in the FTC's Complaint or in the Consent Order resolving the case suggests that the Commission was concerned that Equilon would be responsible for the downstream sale of both Texaco and Shell-branded gasoline, including the wholesale pricing of that gasoline. To the contrary, the Commission chose to treat the proposed venture as, in effect, a merger of the venturers' downstream businesses and, on that basis, chose to approve their integration. Indeed, as the FTC later explained in a case involving a subsequent merger by Texaco: "For antitrust purposes, the Commission evaluat-

ed the formation of the Alliance [Equilon and Motiva] as if it were a complete merger of the downstream operations of Texaco and Shell.... In all subsequent oil merger investigations undertaken by the Commission, we have considered Texaco and Shell to be a single entity when evaluating downstream market concentration." *In The Matter of Chevron Corporation, a corporation, and Texaco Inc., a corporation,* Docket No. C-4023 (January 2, 2002), Statement of Commissioners Anthony and Thompson.

This analysis is consistent with the approach set forth in the DOJ and FTC's joint *Guidelines*, which explain the circumstances under which it is appropriate to "treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines*." In fact, *Example 1* under the *Guidelines* involves treating as a merger the collaboration of "[t]wo oil companies [that] agree to integrate all of their refining and refined product marketing operation." *See Example 1.*[15]

The decision of the court of appeals in this case revisits the formation decision *sub silentio*. Moreover, it does so without a proper invitation and on an utterly inappropriate basis. The issue here is not price fixing, it is the validity and permissible operational activities of the venture. In

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[15] *See also* XIII Herbert Hovenkamp, *Antitrust Law* ¶2137c2, 239-40 (2d ed. 2005) ("A horizontal agreement providing for complete integration of distribution and sales can produce significant savings and generally cannot harm competition more than a complete merger of its participants."); *see also* Werden, 66 Antitrust L.J. at 715-16 ("Many transactions reasonably termed joint ventures by their participants have been treated as mergers under the antitrust laws. A joint venture relating to but one of many activities of its participants still may be properly analyzed as a horizontal acquisition with respect to that one activity.").

reality, the respondents' challenge to Equilon's pricing of the gasoline it produces, transports and sells, is not simply a challenge to a policy decision of an integrated joint venture. Rather, it is an attack on one of the *raisons d'etre* of Equilon: to compete as a seller in the downstream gasoline business. Respondents could have challenged, under the appropriate standards, the inclusion of the marketing function in the permitted scope of integration of the venture at the time of its formation, or, thereafter, where warranted by changed conditions. But it is utterly inappropriate to bring that challenge to the formation or scope of the venture as a Section 1 price-fixing claim. If the respondents wanted to mount that after-the-fact attack on the scope of the venture, they needed to do so directly and by appropriate means, *i.e.*, a rule of reason challenge under either Section 1 of the Sherman Act or Section 7 of the Clayton Act.

Had *that* challenge been raised, the court would have needed to carefully analyze the benefits and costs imposed by allowing Shell and Texaco to include marketing as a part of their venture as well as various other issues that are presented when a court is asked, after the fact, to decree what amounts to partial divestiture of a previously consummated merger. *See* V P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 1205, 296 (2d ed. 2003). Moreover, the usual burdens would apply, and respondents would have had to prove that formation of the venture would have led to higher prices in a relevant market. Under the court of appeals' approach, that burden was shifted to the petitioners, who purportedly were unable to "offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies." Pet. App. 23a.

Amici have a strong intuition about how such a claim would have been resolved, had it been made. (Indeed, the very fact that it was not made, and that respondents chose, instead, to rest their case solely on a misplaced *per se* price-fixing theory strongly suggests that respondents share that intuition.) But that is not the point. The point is that allowing a challenge to formation and scope issues to be analyzed as *per se* price fixing when a venture sets the price of its products is fundamentally misdirected as a matter of antitrust policy towards joint ventures.

IV. THE ANCILLARY RESTRAINTS DOCTRINE IS IMPORTANT IN MANY JOINT VENTURE CASES BUT IT HAS NO APPLICATION HERE.

It is well understood by *amici* that the legitimacy of a joint venture does not give its members license to adopt rules unrelated to the objective of the joint venture or that unreasonably impact competition outside of its scope. A joint venture's rules must be related to the nature, and needs, of the venture. However, in order to achieve the efficiencies for which it was formed, certain agreements restricting the participants' competition with the venture, or outside the venture, must be established. "The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 729 n.3 (1988).

Restrictions that are reasonably "ancillary" to the functions of a lawful joint venture are themselves lawful. *See, e.g., Rothery*, 792 F.2d at 210 (Bork, J.). A restraint is "ancillary" if it can be defended on the ground that it makes the venture more effective in carrying out the pur-

poses for which it was formed. *Id.*[16] In *Rothery*, 792 F.2d 210, for example, Atlas, a national van line that contracted with numerous local agent-carriers, prohibited its members from competing with the association. Agent-carriers were required to bring within the venture all of their interstate carriage that used Atlas's equipment, uniforms, services or other network assets. Judge Bork upheld the restriction under the rule of reason as a reasonably necessary ancillary restraint that eliminated free-riding and preserved the efficiencies of the venture. *Id.* at 229.[17]

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[16] Loyalty, or exclusivity, rules were the paradigmatic example of an ancillary restraint referred to by Judge Taft in *Addyston Pipe*: "Restrictions in [a partnership agreement] . . . with a view of securing [the partners'] entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." *Addyston Pipe & Steel Co.*, 85 F. at 280 (emphasis added).

[17] *See also* the discussion of cases by the United States at Br. of U.S. at 13-15, including: *United States v. Visa U.S.A. Inc.*, 344 F.3d at 243 (charge card joint venturers required to demonstrate reasonable necessity of agreement that members not issue certain competing cards); *Blackburn v. McSweeney*, 53 F.3d 825 (7th Cir. 1995) (lawyers dissolving partnership required to demonstrate reasonable necessity of agreed-upon territorial restrictions on advertising by former partners); *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) (truck leasing companies that agree to provide service for each others' trucks must demonstrate the reasonable necessity of adopting territorial restrictions on leasing competition); *Polk Bros., Inc.*, 776 F. 2d at 188-190 (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores); *NFL*, 459 U.S. at 1077-1078 (Rehnquist, C.J., dissenting from denial of certiorari) (applying ancillary restraints doctrine to a sports league's restraint on members' ownership of other sports teams); *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 613 (1972) (Burger C.J. dissenting) (applying ancillary restraints doctrine to territorial restrictions on members' ability to sell products supplied by venture).

Conversely, restrictions that are insufficiently related to the purposes of the joint venture, or that unnecessarily restrict the participants' non-venture output, will be struck down as anticompetitive under the rule of reason.[18] Thus, in *Three Tenors*, the FTC, affirmed by the D.C. Circuit, held that two record companies that formed a joint venture to market a new album by the Three Tenors (3T3) could not justify a moratorium *by the venturers* on promoting or discounting earlier Three Tenors albums (3T1 and 3T2) that were not, themselves, a part of the joint venture.[19] Then-Chairman Muris held that the joint venture participants, Polygram and Warner, "cannot claim the integrative efficiencies that could conceivably have been brought about by combining the production and marketing of all Three Tenors products. Accordingly, the restrictions on the marketing of 3T1 and 3T2 cannot be considered 'ancillary' to the present joint venture, *as a matter of law*, because they are not related to the efficiencies the joint venture was created to produce."[20] 2003 FTC Lexis at *94 (emphasis in original).

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[18] As explained by the United States:

> [C]ourts have regularly applied the ancillary restraints doctrine to agreements respecting joint venture participants' conduct outside of the joint venture. Some courts have also applied the doctrine to restraints on admission to joint venture membership. But so far as the United States is aware, the court of appeals' decision in this case is the first ruling to apply the ancillary restraints doctrine to constraints on the joint venture's *own* conduct.

Br. of U.S. at 15 (emphasis in original).

[19] The case was brought under Section 5 of the FTC Act, 15 U.S.C. 45, but that is of no consequence for the purposes of this discussion.

[20] Chairman Muris pointedly contrasted the restraint at issue in the *Three Tenors* with *General Motors Corp.*, 103 FTC 374 (1984), in which General Motors and Toyota engaged in a production joint venture, but limited their pricing agreement to the output of the venture. *Three Tenors*, 2003 FTC LEXIS at *88.

Amici agree fully with the United States that "[t]he ancillary restraints doctrine simply has no role to play in this case," Br. of U.S. at 16, although it obviously remains an important principle in joint venture cases.[21] For reasons explained previously, the agreement at issue here—the pricing of the gasoline the venture was established to produce and sell—had no impact on competition between the joint venture participants, or between the venture and its owners. As discussed in the preceding section, Equilon's pricing of its own gasoline had no effect on competition in any manner relevant to Section 1. In this case, therefore, the single entity analysis provides a complete answer. Accordingly, it was inappropriate and incorrect for the court of appeals to require petitioners to justify their "price-fixing" arrangement by showing that the agreement was "ancillary" to and "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 21a. No such justification was necessary, because the venture's pricing decisions were not price fixing at all, at least not in any sense of the word that is relevant under Section 1.

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[21] In suggesting that this case does not present an ancillary restraint issue, *amici* by no means intend to disagree with the analysis set forth in the separate briefs of other *amici*, regarding the manner and circumstances in which the rule of reason ought to be applied, were one to get beyond the single-entity issue. However, for the reasons explained in text, *supra*, we believe that it was unnecessary to reach that issue in the present case. We further believe that, while it would be salutary for this Court to declare that the rule of reason and ancillary restraint doctrine have the broad scope and applicability suggested by other *amici*, it would be equally beneficial (and more appropriate to the facts of this case) to reverse based on single-entity principles.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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